

PATENT  
Attorney Docket No. 101.0044-03000  
Customer No. 22882

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: )  
Gary K. Michelson, M.D. )  
Serial No.: 09/497,590 ) Confirmation No.: 7688  
Filed: June 6, 2000 )  
For: APPARATUS INCLUDING A )  
GUARD MEMBER HAVING A ) Group Art Unit: 3732  
PASSAGE WITH A NON- ) Examiner: Unassigned  
CIRCULAR CROSS SECTION )  
FOR PROVIDING PROTECTED )  
ACCESS TO THE SPINE (as )  
amended) )

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Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

SEP 10 2004

Sir:

REQUEST FOR INTERFERENCE UNDER 37 C.F.R. § 1.604

Applicant hereby requests an interference with U.S. Application No. 10/246,995 (U.S. Publication No. 2004/0059339) to Roehm, III et al. (hereinafter, "Roehm") pursuant to 37 C.F.R. § 1.604(a). A proposed count is attached hereto.

Claims 1-6 and 8 of Roehm correspond to claims 1-7, respectively, of the proposed count. Claims 188-194 of the present application correspond to claims 1-7, respectively, of the proposed count.

Applicant requests an interference with Roehm because the aforementioned claims of Roehm cover subject matter which was invented by Applicant prior to the earliest priority date of Roehm.

Applicant submits that the subject matter of claims 1-7 of the proposed count are fully supported by Applicant's original disclosure, for example, on page 31, lines 19-21; page 64, line 5 to page 65, line 19; and page 66, lines 13-17; and Figs. 33, 34, and 36.

Request for Interference 9-10-04

The Examiner is requested to declare an interference between the present application and U.S. Application No. 10/246,995.

If there is any fee due in connection with the filing of this Statement, please charge the fee to our Deposit Account No. 50-1066.

Respectfully submitted,

MARTIN & FERRARO, LLP

Date: September 10, 2004

By: 

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**PROPOSED COUNT UNDER 37 C.F.R. § 1.604(a)(1)**

1. A dilator for use in soft tissue of a human body to provide an access channel to a planned surgery site adjacent the spine and comprising:
  - a tube having a proximal end and a distal end and a longitudinal axis;
  - said tube having a non-circular cross-sectional shape in a plane perpendicular to said longitudinal axis at a first location proximate said distal end.
2. The dilator of claim 1 and wherein: said tube has non-circular cross-sectional shape in planes perpendicular to said longitudinal axis, said shape extending from said first location proximate said distal end to a second location at least eighty percent of the distance from said distal end to said proximal end.
3. The dilator of claim 2 and wherein: said tube has a non-circular cross-sectional shape throughout its length from said distal end to said proximal end.
4. The dilator of claim 2 and wherein: the shape of said non-circular cross-sectional shape of said tube is the same from said first location to said second location and has a major axis and a minor axis.
5. The dilator of claim 4 and wherein:
  - the overall dimension of said dilator along the major axis is between 28 and 40 mm; and
  - the overall dimension of said dilator along the minor axis is between 14 and 20 mm.
6. The dilator of claim 4 and wherein: said shape is elongate with parallel sides and circular ends with radii, the centers of the end radii being on a line bisecting the minor axis.
7. The dilator of claim 1 and wherein said tube has a channel therethrough, said channel being adapted to receive a pair of side-by-side dilators each having a circular cross-section transverse to a longitudinal axis thereof.